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IN THE

SUPREME COURT

OF THE

United States

October Term, 1953

KWIKSET LOCKS, INC.,
Petitioner,

vs.

CARL A. HILLGREN,
Respondent.

PETITION FOR CROSS WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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KWIKSET LOCKS, INC., *Petitioner,* vs. CARL A. HILLGREN, *Respondent.*	No. 698

PETITION FOR CROSS WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To The Honorable Chief Justice and Associate Justices of the Supreme Court of United States:

Your Petitioner, Kwikset Locks, Inc., respectfully prays that a cross writ of certiorari be issue by the United States Court of Appeals for the Ninth Circuit to review the decision of That Court to the effect that United States Letters Patent No. 2,489, 160 issued November 22, 1949 to Kwikset Locks, Inc. as the assignee of Adolf Schoepe and Albert S. Lord is valid but not infringed.

OPINIONS BELOW

The Opinion of the District Court is in the form of a Minute Order appearing at page 21 of the Record heretofore filed by Petitioner Carl A. Hillgren.

A first Opinion rendered by the Court of Appeals for the Ninth Circuit was entered on March 16, 1953 and appears at 97 U.S.P.Q. 206. This first Opinion has not otherwise been reported and is not included in the Record on file. A copy of the first Opinion is attached hereto.

Following the granting of a petition for rehearing in which the first Opinion was vacated, a second Opinion was entered and appears in the Record on file at pages 898-914. This Opinion is reported at 100 U.S. P.Q. 289, ... F (2d) .....

JURISDICTIONAL STATEMENT

The date that the original Judgment was entered is March 16, 1953. The date on which Petition for Rehearing was granted was April 28, 1953, on which date the original Judgment and Opinion were ordered vacated.

The Opinion and Judgment sought to be reviewed were entered on February 3, 1954.

A second Petition for Rehearing of Kwikset Locks, Inc., et al filed March 4, 1954 was denied March 22, 1954.

By order staying issuance of mandate entered March 29, 1954, the mandate of the Court of Appeals for the Ninth Circuit was stayed pending the filing and consideration and disposition by the Supreme Court of the United States of a Petition for Writ of Certiorari to be made by appellee, Carl A. Hillgren, providing such petition is filed in the Clerk's office of the Supreme Court of the United States on or before April 26, 1954. In the event the Petition for Writ of Certiorari is granted then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

The statutory provision believed to confer on this court jurisdiction to review the judgment in question by Writ of Certiorari is Title 28 U. S. Code Section 1254.

A certified transcript of the Record in this case, including some of the proceedings in the Court of Appeals has been heretofore furnished by Petitioner Carl A. Hillgren.

QUESTIONS PRESENTED FOR REVIEW

1. As a finding of infringement of a patent for a finding of fact which cannot be set aside by an appellate court under Rule 52(a), Federal Rules of Civil Procedure, is it proper for the appellate court to set it aside when

(a) There is a serious dispute between the parties as to the manner in which the accused construction is made, which dispute was resolved by the trial court in favor of a finding of infringement?

(b) Statements made in the first opinion of the appellate court clearly indicate that the reviewing court did not understand how the alleged infringed construction was made as found by the trial court, which errors have since been acknowledged by the reviewing court by the vacating of the first opinion and the judgment entered thereon?

(c) Statements made in the second and present opinion still clearly indicate that the reviewing court has failed to comprehend clearly how the patented construction is made and how the alleged infringing construction is made?

(d) The reviewing court in its opinion has attributed to certain elements in the patented construction certain functions and has stated that these functions are lacking in the accused construction, whereas, as a matter of fact, the trial

court by resolving the despute as to the manner in which the accused construction has found that these functions are performed by the corresponding elements in the accused construction?

2. Where the appellate court seeks to review and reverse a finding of infringement of a patent by reference to the method by which the accused article is made and there is a serious dispute between the parties as to the method by which the accused article is made, can the appellate court ignore the findings of the trial court, place its own interpretation on the evidence, and reverse the finding of infringement in spite of the provisions of Rule 52(a)?

3. Where an appellate court seeks to review and reverse a finding of infringement of a patent claim containing the word "annular", is it proper for the appellate court to place its own restrictive interpretation upon that word in a manner contrary to the interpretation placed upon the same word in the same claim by the examiner in the Patent Office who allowed the claims in the first instance?

5. Where an appellate court seeks to review and reverse a finding of infringement, can it do so under Rule 52(a) by attributing certain functions to certain elements in the patented structure and stating that these are lacking in the accused structure where the method of manufacture of the accused structure is in dispute and has been resolved by the trial court who not only saw and heard the witnesses but also saw their

explanatory gestures, incapable of being reproduced in the Record?

RULE 52(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE IS INVOLVED

The pertinent portions of Rule 52(a) of the Rules of Civil Procedure which are involved in this petition read as follows:

> "Rule 52(a) Effect. In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; . . . Findings of Fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

STATEMENT OF FACTS

Plaintiff Hillgren brought suit against the defendants, Kwikset Locks et al, alleging that defendants were infringing the Hillgren Patent No. 2,403,597, issued July 9, 1946, for a Door Lock.

Jurisdiction of the District Court was invoked under 28 USCA 1388 (a).

Under the provisions of Rule 13(b) of the Federal Rules of Civil Procedure the defendant, Kwikset Locks, Inc., counterclaimed alleging that the plaintiff

Hillgren was infringing Patent No. 2,489,160, issued November 22, 1949, to Kwikset Locks, Inc. as assignee of Adolf Schoepe and Albert S. Lord. A copy of that patent appears in the Book of Exhibits at page 850.

The Trial Court in a memorandum opinion (R. 21) found that Kwikset Locks, Inc. had infringed plaintiff's patent.

> "The Court finds that plaintiff has infringed defendant's patent, as set forth in the counterclaim filed in this action, ..."

Appropriate findings of fact and conclusions of law were entered pursuant to this memorandum opinion (R. 22 to 30.) Included in these findings are the following:

> "25.
>
> "The structure of a door knob comprising an insert applicable to a door lock spindle with a shell around the insert, the shell and insert presenting annular portions in close proximity to each other, and a cap closing the outer end of the shell having a flange disposed between the annular portions spread by the annular portion on the insert beneath the annular portion on the shell and having a tight fit with the annular portions was new in the art.
>
> "26.
>
> "The method of making the door knob and the structure resulting therefrom wherein an insert applicable to a door lock spindle and a surrounding shell are assembled together with both parts pre-

senting annular portions near their outer ends and driving a flanged cap onto the insert so that its flange is spread by the insert beneath the annular portion on the cap and is held against springback by the continued engagement between flange and the insert, was new over the art and involved invention over what was known in the art.

"27.

"The knobs manufactured and sold by the plaintiff, Carl A. Hillgren, embodied the invention of the defendants' patent No. 2,489,160, and therefore infringe the claims of said patent.

"28.

"The knobs manufactured and sold by the plaintiff, Carl A. Hillgren, are but colorable variations of the invention disclosed in patent No. 2,489,160.

"29.

"The knobs manufactured and sold by the plaintiff, Carl A. Hillgren, are the mechanical equivalents of what is disclosed and claimed in patent No. 2,489,160."

Both parties appealed to the Court of Appeals for the Ninth Circuit from the judgment entered by the District Court in this case. In the defendant's appeal the Hillgren patent was originally and ultimately held to be invalid and not infringed. In the plaintiffs' appeal the plaintiffs' patent was held by the Court of Appeals to be valid, the court stating (R. 910)

"The District Court has found that Kwikset's fitting or method of making a door knob is new

and involves invention over the prior art and we think the evidence supports the finding."

In the original opinion, a copy of which is attached hereto, the Court of Appeals proceeded to ignore the findings above quoted, to place its own interpretation on the evidence, and to conclude that the plaintiffs' door knobs, one of which is illustrated at the lower right-hand corner of (R. 911), a page of the Opinion of the Court of Appeals, were not an infringement for the reasons therein stated. These reasons were acknowledged by the Court of Appeals for the Ninth Circuit to be erroneous. In the granting of Kwikset's Petition for Rehearing and following the rehearing a new opinion was entered wherein the findings of the Trial Court were again ignored and the plaintiff's knob found not to be an infringement for the new reasons presented in the second opinion (R. 908-913).

In the second opinion of the Court of Appeals statements are made which indicate

1) That the Court of Appeals was of the erroneous view that the manner in which the plaintiff's knobs were made was not in dispute.

2) That the Court of Appeals was not aware that the dispute pertaining to the manner in which the plaintiff's knobs were manufactured had been resolved by the Trial Court who had the benefit not only of seeing and hearing the witnesses and judging as to their credibility, but also had the

opportunity of observing their explanatory gestures as to how the accused knobs were made.

3) Statements are made in the opinion indicating that the Court of Appeals, even in its second opinion, has a misconception of how the defendant's knobs disclosed in the patent are made and how the accused knobs manufactured by the plaintiff are made.

Other pertinent facts having an important bearing on this controversy are as follows. While the defendants' knob patent No. 2,489,160 was pending in the Patent Office, one Nels H. Seaholm had filed an application for a patent on a door knob which matured into Patent No. 2,517,803, issued Aug. 8, 1950, a copy of which is attached hereto. This patent was issued to the plaintiff, Carl A. Hillgren, as assignee and was offered in evidence at pages 384 and 385 of the Record as Ex. 13. During the course of the trial Hillgren's counsel asserted that this patent was the patent under which the plaintiff Hillgren was manufacturing the accused knobs, at page 55 of the record:

"The Court: Can I ask a question?

"Mr. Jamieson: Surely.

"The Court: Is that the patent (the Seaholm patent) on which you are relying?

"Mr. Jamieson: No. This is the patent on the counterclaim, you see, *that we are manufacturing under*. It is rather confused, I will admit." (Underscoring added.)

At R. 778 Hillgren's witness Lord testified on direct examination by Hillgren's attorney as follows:

"Q. Are you familiar with the knob that is now manufactured by the Hillgren Company that is the accused knob in this lawsuit?

"A. Yes.

"Q. I will show you a copy of the patent to Seaholm, that being Exhibit 13, and also an example of the accused structure, being Exhibit 8, and I will ask you to describe to the court the method of manufacturing that device.

"A. Well, in the first place, on Hillgren's knob and insert, the knob is not completed before the insert is put in. The walls are left straight on this—instead of being curled over like that, it is left straight.

"Then the insert is put in, they bring the press down over it, and it forms that shell over the insert.

"Q. We have an exhibit here that shows that I think. Exhibit D has been offered in evidence.

"A. Well, that shell is brought over that insert and formed around it. Then the cap—

"Q. Pardon me before you go any further. At that stage, is there any pressure between the circular opening of the shell and the insert?

"A. No. That is to get the insert into the shell.

"Q. Continue.

"A. And then the cap is put on, slipped on there, and the insert is used as a die to curl the lower part of that cap up into the curl of the knob.

"Q. At that point does the flange of the cap slide easily between the insert and the outside shell as shown in Exhibit D?

"A. Yes. It fits freely into that.

"Q. So that there is more space between the insert and the shell than the thickness of the flange on the cap?

"A. That's right.

"Q. Then after you have used the central insert as an anvil or die to flare the flange on the cap outwardly, what is the next step in making the accused structure?

"A. Well, that is the finished part then. The insert is not really used to do anything from there on out.

"Q. Isn't there a crimping process after that between the cap and the shell?

"A. Yes.

"Q. You didn't mention that.

"A. After this shell is wrapped around and the insert is in, then the cap is put in and the insert is used as merely a die to fold that flange up underneath the rounding on the top of the shell.

"Q. After that is done, is there another die that presses the shell inwardly against the cap?

"A. No. The cap is actually spread out on that insert."

The Seaholm patent therefore is acknowledged to have correctly illustrated the manner in which the accused knobs manufactured by the plaintiff were made. During the period that the defendant Kwikset's patent was copending in the Patent Office with the Seaholm patent the Examiner recognized the similarity between the structure and method of manufac-

ture between the disclosure made in the defendant's patent and the Seaholm application and proposed an interference. He consequently sent a letter to Seaholm's attorney quoting verbatim a claim which ultimately became claim 3 of the Kwikset patent, see Plaintiff's Ex. 9A, Ex. Bk. 843 and 844. Seaholm was given thirty days from August 23, 1949, in which to file the statement required by Patent Office Rule 202 for the purpose of determining whether or not an interference should be declared. He did not do so within the time allowed and having thus defaulted no interference was declared. This action on the part of the Examiner, petitioner regards as highly significant because it indicates that the Examiner who allowed Claim 3 of the Kwikset patent was under the impression that the exact wording of this claim, including the word "annular" applied to the disclosure in the Seaholm patent which admittedly discloses Hillgren's door knobs alleged by Kwikset to be an infringement of its patent.

Another significant fact is that during the pendency of the application for the Kwikset patent a petition was filed with the Commissioner of Patents requesting that the Kwikset application be made special because of the then infringement being conducted by the plaintiff Hillgren. In support of the petition to have the Kwikset application made special a showing was made of the character of door knob then being manufactured by the plaintiff Hillgren. After due consideration, the Kwikset application was made special by order of the Assistant Commissioner of Patents. In making the

application special the Assistant Commissioner of Patents must have been of the opinion that the Hillgren knob was a present infringement justifying speedier than normal action on the application so that the infringement might be speedily stopped. Had the Assistant Examiner been of the opinion that the Hillgren knob was not an infringement he would have refused to have made the application special.

There are thus three independent opinions of proper tribunals to the effect that the plaintiff's knobs are an infringement of the Kwikset patent in suit. These are

1) The Examiner who granted the Kwikset claims and who proposed the interference between the Kwikset application and the Seaholm application which admittedly discloses the accused knob.

2) The Asssitant Commissioner of Patents who felt justified in making the Kwikset application special on the showing of infringement made.

3) The Trial Court who held that there was infringement and entered the findings above quoted.

The issue presented in this petition is primarily whether the Court of Appeals is justified in ignoring the express provisions of Rule 52(a) and in reversing the Trial Court on a finding of infringement which is not clearly erroneous and which is almost universally regarded as a finding of fact.

ARGUMENT

Rule 52(a) provides

> "Findings of fact shall not be set aside unless clearly erroneous."

The question of infringement is generally held to be a question of fact and findings concerning the question of infringement are generally held to be findings of fact.

The excuses given for a reviewing court setting aside a finding of infringement is that where

> "the record and exhibits enable us to clearly comprehend the nature both of the process patented and the alleged infringing process, the question of infringement resolves itself into one of law . . ." (See *Opinion,* R. 910).

But when does the Appellate Court "clearly comprehend" and when does it only mistakenly believe that it "clearly comprehend(s)?" In the present case there is a clear dispute as to how the patented knob is made both as to the disclosure in the patent and as to the actual manufactured construction of the knob itself. This dispute clearly indicates that herein the Appellate Court does not "clearly comprehend" what was disclosed in the patent and how the patented knob is made. Therefore, the rule of *Kemart Corp. v. Printing Arts Research Lab., Inc.,* 201 F. 2d 624, 627, 628, and the rule of *United States v. Esnault-Pelterie,* 303 U. S. 26, 30, does not apply. There is no justification

for the Appellate Court setting aside finding of fact of infringement under Rule 52(a) because the Appellate Court lacks in this clear comprehension. To demonstrate this lack of clear comprehension we point to statements made in the opinion which indicate it.

At page 909 of the Record the Court of Appeals in its second and final opinion states:

> "An examination of the Kwikset knob shell, which is the part grasped by the hand in using it, discloses that the top edge of the shell is curved or curled inwardly *so as to fit tightly* against a complementary concave area at the top, outside edge of the insert."

This statement is contrary to fact.

During the course of the trial Hillgren's counsel requested Kwikset to produce the assembly of just the shell and the insert prior to the application of the cap, see R. 772 and 773. This request was complied with over the noon recess and the physical exhibit was introduced in evidence as Defendants' Ex. MM. This physical exhibit clearly shows that the above quoted statement in the opinion of the Court of Appeals is not in accordance with fact.

> "An examination of the Kwikset knob shell . . . discloses that the top edge of the shell is curved or curled inwardly . . ."

But it does not "fit tightly against a complementary concave area at the top outside edge of the insert."

On the contrary there is a decided space between the surface of the curl and the top outside edge of the insert. A thin flexible material can be readily passed between the top outside edge of the insert and the surface of the curl down into the interior of the shell. The so-called tight fit conseqquently does not exist in the "Kwikset knob shell." Furthermore, this tight fit is contrary to the teachings of the patent. In the patent, Ex. Bk. 850, column 2, line 36 et seq, it is stated:

> "In assembling the insert 20 with the shell the insert is placed in the shell and is forced downwardly through the curl 19 the extension 24 spreading the curl tightly. The assembly is performed in a die on a punch press . . . ."

As the top outside edge of the insert is chamfered or beveled off and is consequently of reduced diameter as compared with the maximum diameter of the extension 24 as stated in column 2, lines 34 and 35, and the curl 19 is opposite this chamfered edge, it is obvious that there cannot be a tight fit between the curl 19 and the chamfer. The curl 19 in passing up over the maximum diameter of the extension 24 is expanded slightly but when it reaches its uppermost position opposite the chamfer the curl is then opposite a surface of smaller diameter and consequently no tight fit could exist. This is conclusively established by the physical Ex. MM.

The above-quoted erroneous statement in the opinion is the starting point of the erroneous conclusion to which the Court of Appeals arrives with respect to

infringement. Near the end of the opinion (R. 912) the Court of Appeals makes this observation:

> "To more clearly contrast the essentials of the two knobs, we summarize as follows: Both knobs utilize the insert as a die. To that extent they are similar. However, there is a substantial difference in the principles of construction of the two knobs which is reflected in the methods by which they are assembled, to-wit: *In the Kwikset knob, it is important that initially there be a tight fit between the shell curl and the insert in order that sufficient spring-back be created in the shell curl to hold the cap in place.* By the way of comparison, in the assembly of the Hillgren knob there is a space between the insert and the shell edge through which the cap flange is forced. . . ."

This distinction is not supported by the patent nor by Ex. MM and the Court of Appeals consequently failed to clearly comprehend all of the similarities between Kwikset's patented knob and Hillgren's accused knob. In both the patented knob and in the accused knob the insert functions as a die to spread the cap flange beneath the outer edge of the shell. In the course of such spreading of the cap flange the cap flange is expanded against the edge of the shell regardless of whether the edge of the shell is in the form of a broad curl or whether it is in the form of a thin edge as in the accused Hillgren knob. In both knobs the spreading of the cap flange by the insert which is used as the die beneath the edge of the shell, locks the cap in position and against withdrawal. In both knobs the

spreading of the cap flange against the edge of the shell makes a tight fit between the cap flange and the edge of the shell regardless of whether the edge of the shell is curled or not. In both knobs, as the die provided by the insert remains behind the spread cap flange, the cap flange is held against springing back and the tight fit is preserved.

The difference between the patented knob and the accused knob is nothing more than one of degree. The patented knob uses a relatively broad edge or tongue at the outer end of the shell which is formed by the curl. The accused knob uses a narrow edge or tongue in the outer edge of the shell. The patented knob has the die flare the cap flange only slightly beneath the outer edge of the shell. The accused knob flares the cap flange to a greater extent beneath the edge of the shell. These differences in degree employing the same principle do not avoid infringement. While the Court refers to the Hillgren knob as employing a tongue and groove principle (R. 913) the same tongue and groove principle appears in the patented knob, the only difference being that a broader tongue afforded by the curl and a broader groove in the cap flange is present.

The Court at R. 911 undertakes to attribute to the word "annular" a peculiar and highly limited interpretation, see Footnote 19 appearing at the bottom of R. 911. By imposing on the word "annular" a peculiar and restricted interpretation the Court attempts to set up a further basis for justifying its holding of non-infringement. However, as above pointed out, the

Examiner who allowed claims 3 to 6 of the Kwikset patent containing the word "annular" regarded this word as being equally applicable to the accused knob as depicted in the Seaholm application, and consequently quoted claim 3 verbatim for interference purposes. The Examiner thus interpreted this word to be broad enough to be applicable to the disclosure made in the Seaholm application. Certainly, when the Examiner knowingly and intentionally allowed the claims containing this word and interpreting the word as being of this breadth, it is unfair to the patentee for the Appellate Court to disregard entirely his interpretation of the claim and to place a more restricted interpretation on the claim so that the construction shown in the Seaholm patent is no longer held to infringe. The Court, in its interpretation of the claim, should act consistently with the interpretation of it placed upon it by the Examiner who allowed it.

Part of the basis on which the Court of Appeals bases its conclusion of non-infringement is predicated on the theory that Hillgren applies lateral pressure to the sides of the shell while applying the cap and Kwikset does not do this according to the patent. This application of lateral pressure to the sides of the Hillgren shell is emphasized in the opinion as follows (R. 912):

> "Then the (Hillgren) cap is forced down upon the insert *while the sides of the shell are forced laterally toward the insert. Under the dual pressure* the Hillgren cap flange is forced between the shell and the curved portion of the insert. . . ."

Again at R. 913:

> "By way of comparison, in the assembly of the Hillgren knob there is a space between the insert and the shell edge through which the cap flange is forced *and an inward lateral pressure is placed upon the shell to keep its edge in position.* . . ."

This question of whether or not Hillgren applies lateral pressure to the sides of the shell is in dispute. Kwikset contends and has contended that no application of lateral pressure is in fact applied and also that it is unnecessary for the following reasons:

1) The application of lateral pressure to the sides of the shell is unnecessary in the Kwikset patented knob.

2) The application of lateral pressure to the sides of the Hillgren knob is likewise unnecessary.

3) It is difficult to conceive of a die which would move down on top of the cap to force the cap down against the insert and which would at the same time, during its downward movement, apply lateral pressure to the sides of the Hillgren shell.

4) No mention whatsoever is made of the application of lateral pressure during the application of the cap in the Seaholm patent which is the patent that the Trial Court was informed that Hillgren was "manufacturing under" (R. 55) as follows:

"The Court: Can I ask you a question?

"Mr. Jamieson: Surely.

"The Court: Is that the patent on which you are relying?

"Mr. Jamieson: No. This is the patent (Seaholm) on the counterclaim, you see, *that we are manufacturing under.* It is rather confused, I will admit."

At R. 778 et seq. the witness Lord gives some rather confusing testimony as follows:

"Q. Are you familiar with the knob that is now manufactured by the Hillgren Company that is the accused knob in this lawsuit? A. Yes.

"Q. I will show you a copy of the patent to Seaholm, that being Exhibit 13, and also an example of the accused structure, being Exhibit 8, and I will ask you to describe to the court the method of manufacturing that device.

"A. Well, in the first place, on Hillgren's knob and insert, the knob is not completed before the insert is put in. The walls are left straight on this—instead of being curled over like that, it is left straight.

"Then the insert is put in, they bring the press down over it, and it forms that shell over the insert.

"Q. We have an exhibit here that shows that, I think. Exhibit D has been offered in evidence.

"A. Well, that shell is brought over that insert and formed around it. Then the cap—

"Q. Pardon me before you go any further. At that stage, is there any pressure between the circular opening of the shell and the insert?

"A. No. That is to get the insert into the shell.

"Q. Continue.

"A. And then the cap is put on, slipped on there, and the insert is used as a die to curl the lower part of that cap up into the curl of the knob.

"Q. At that point does the flange of the cap slide easily between the insert and the outside shell as shown in Exhibit D?

"A. Yes. It fits freely into that.

"Q. So that there is more space between the insert and the shell than the thickness of the flange on the cap? A. That's right.

"Q. Then after you have used the central insert as an anvil or die to flare the flange on the cap outwardly, what is the next step in making the accused structure?

"A. Well, that is the finished part then. The insert is not really used to do anything from there on out.

"Q. Isn't there a crimping process after that between the cap and the shell? A. Yes.

"Q. You didn't mention that.

"A. After this shell is wrapped around and the insert is in, then the cap is put in and the insert is used as merely a die to fold that flange up underneath the rounding on the top of the shell.

"Q. After that is done, is there another die that presses the shell inwardly against the cap?

"A. No. The cap is actually spread out on that insert.

"Q. It seems to me I remember Mr. Hillgren testified in his deposition there was another step there. There was a die used to compress the shell.

"A. Well, yes.

"Mr. Miller: I think this is leading. I object to it.

"The Court: Sustained. The answer may go out.

"Q. (By Mr. Jamieson): Is there a die that is used to compress the shell? A. Yes.

"Q. Describe that die.

"A. Well, it is just a die about the same shape as this knob and the cap is put in there and it is brought down, it pushes the cap down and the shell in at the same time.

"Q. Before that die is used, is there any pressure between the shell and the cap, or is it a loose fit?

"A. It is a loose fit.

"Q. And the tight fit between the shell and the cap is acquired by that die, is that right?

"A. Yes, that's right."

Whether Lord intended to testify that lateral pressure was applied to the sides of the shell as well as the downward pressure on top of the cap is not clear. In one instance he denies that there is "another die that presses the shell inwardly against the cap." In a later instance he states that there is "a die about the same shape as this knob and the cap is put in there and it is brought down, it pushes the cap down and the shell in at the same time." Insofar as Lord's testimony relates to applying inward pressure to the sides of the shell, it is in conflict with the Seaholm patent, and this conflict must have been resolved by the Trial Court in favor of holding that no lateral pressure was

applied. The Court has already made findings indicative of the fact that the Trial Court did not regard the witness Lord as being credible. Note for example the findings 20, 21, 22, 23, and 24 (R. 27 and 28) which are contrary to the testimony of Lord.

The Appellate Court has made a serious error in undertaking to review the evidence and accept the Lord version of how the Hillgren knob is made at the middle of page 780 of the record concerning a matter that is in dispute. Rule 52(a) indicates that this cannot be done.

It is a matter of public interest to determine when an Appellate Court can disregard the express provisions of Rule 52(a), review the evidence on a disputed issue of fact and accept the version of one witness of one of the litigants as to how a certain structure is made where the Trial Court, who saw and heard the witness and who has ruled him to be incredible has refused to accept that version.

CONCLUSION

This Court is asked to review the decision of the Ninth Circuit for the purpose of determining when a Court of Appeals is justified in ignoring the express provisions of Rule 52(a). The excuse given is that the records and exhibits enable the Court to *"clearly comprehend"* the issue and thus be in a position to pass on the question just as well as the Trial Court. However, the opinion indicates clearly that the Appellate Court did not possess the clear comprehension of how the patented knob was made and attributes to it a tight fit between the curl and the insert prior to the application of the cap. This is not true and the conclusion of non-infringement based upon this distinction should not follow. The Trial Court's findings of infringement should not be set aside.

Furthermore, the Court in placing its own interpretation on the word "annular" is placing an interpretation upon this word inconsistent with the interpretation placed upon it by the very Examiner who allowed it in the Kwikset claims.

A review and reversal of the Court of Appeals is respectfully urged.

Respectfully submitted,

FRED H. MILLER, Esq.,
Attorney for Petitioner,
Kwikset Locks, Inc.

CERTIFICATE OF COUNSEL

STATE OF CALIFORNIA,
County of Los Angeles.—ss:

FRED H. MILLER, being duly sworn, deposes and says that he is the attorney for the Petitioner for a Petition for Cross-Writ of Certiorari; that he has read the foregoing petition and knows the contents thereof, and that the same is well founded in law and fact in affiant's opinion, and is not presented for purposes of delay.

FRED H. MILLER

Subscribed and sworn to before me,
this 5th day of May, 1954.

HELEN WEIGHTMAN

Notary Public in and for the above
County and State.

My Commission expires March 6, 1956.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KWIKSET LOCKS, INC., ADOLF SCHOEPE and KARL REINHARD, *Appellants,* vs. CARL A. HILLGREN, *Appellee.*	)	No. 13,060 Mar. 16 1953
CARL A. HILLGREN, *Appellant,* vs. KWIKSET LOCKS, INC., ADOLF SCHOEPE and KARL REINHARD, *Appellees.*	)	

Appeals from the United States District Court, Southern District of California, Central Division

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Before: STEPHENS, HEALY, and POPE, Circuit Judges

STEPHENS, Circuit Judge

Carl A. Hillgren is the holder of United States Letters Patent No. 2,403,597, issued July 9, 1946, for an invention of a "Door Lock". Kwikset Locks, Inc., is

the owner of a United States Letters Patent No. 2,489,160, issued to Adolf Schoepe and Albert S. Lord, jointly, on October 20, 1947, on a "Doorknob and Method of Making Same", and assigned to Kwikset on November 22, 1949. Hillgren brought suit in the United States District Court for the Southern District of California, charging Kwikset, Adolf Schoepe, and Karl Reinhardt (hereinafter referred to collectively as "Kwikset") with infringement of its "Door Lock" patent and seeking an injunction and damages. Kwikset answered, denying infringement and alleging that Hillgren's patent is void as anticipated. Kwikset in addition sought affirmative relief by way of counter-claim for injunction and damages based upon the allegation that Hillgren was infringing Kwikset's patent on a "Doorknob and Method of Making Same". Hillgren denied the charge of infringement and attacked the validity of Kwikset's doorknob patent.

The complaint and counter-claim were tried together. After hearing all the evidence, the court found that Hillgren's "Door Lock" patent No. 2,403,597 was valid and had been infringed by Kwikset and that Kwikset's "Doorknob" patent No. 2,489,160 was valid and had been infringed by Hillgren.

The court awarded both plaintiff (Hillgren) and counter-claimant (Kwikset) their prayers for injunctions and ordered that an accounting for damages be had against the defendant (Kwikset) and counter-defendant (Hillgren), respectively. Both Kwikset and

Hillgren appeal from adverse judgments. We shall treat the appeal from the complaint and the appeal from the counter-complaint separately.

I. THE HILLGREN "DOOR LOCK"

The Hillgren "Door Lock" is described most simply as a reverse rocker type lock with a deadlatching mechanism. The Kwikset lock may be identically defined. As the court stated in its findings, the reverse rocker type lock is found in the prior art.[1] The reverse rocker type lock, employed by both Hillgren and Kwikset operates as follows: When a doorknob is unlocked the spindle may be turned in either direction, forcing the main action of the bolt forward. As the main action advances, it engages a pivoted rocker, forcing the top end of the rocker forward which consequently brings the bottom end of the rocker backward. Since the bottom of the rocker is engaged in the main lock bolt, this movement retracts the main bolt from its secured position in the door sash.

Both the reverse rocker type lock and the direct action bolt lock, as they appeared in the prior art, had one serious defect: Although the main action could not be put into play to bring back the main bolt when the knob was locked in position, if a knife or thin blade were inserted between the door sash and the main

[1]Findings of Fact, 9(e): "A deadlocking mechanism is incorporated in the midst of a reverse rocker type lock mechanism and all of the advantages, functions and results of both the prior art reverse rocker type locks and the prior art deadlatched locks is achieved for the first time in one combination lock."

lock bolt, the bolt could be forced back and the door opened.

However, the prior art has also disclosed a mechanism for deadlatching the main bolt and thereby forestalling any attempt to force back the bolt other than by the turning of an unlocked door and spindle. The deadlatching mechanism operates in the following manner: In addition to the main bolt, the lock is constructed with an auxiliary bolt, independently operated and so located that when the door is in a closed position the main bolt is extended into the recess of the door sash while the auxiliary bolt is depressed back toward the main housing of the lock. Within the lock housing is a dogging arm which is held clear of the main bolt by the auxiliary bolt when the auxiliary bolt is in the extended position. However, when the auxiliary bolt is depressed, the dogging arm is freed and is so constructed that when unrestrained it moves into a position to block any effort to force the main bolt back into the housing. However, when the main action of the lock is put into operation by means of the door knob and spindle, the dogging arm is raised from its blocking position by a beveled lug which is part of or operates solely in conjunction with the main action.

Hillgren concedes that the trial court specifically found that a deadlatching mechanism was present in the prior art. However, the conclusion that the Hillgren patent is valid is based primarily upon Hillgren's claims, embodied in finding 9a, that the Hillgren patent discloses "[t]he world's first deadlatched reverse

rocker type lock." In other words, Hillgren is claiming, and the district court sustained, a patent on a combination.[2]

Congress, in its exercise of a constitutional delegation of authority,[3] has provided for the patenting of inventions and discoveries of new and useful arts or processes, machines, manufactures or compositions of matters, or new and useful improvements thereof. Title 35, U.S.C.A. §31 (cf. revision, 1952, Title 35, U.S.C.A. §101). Thus, in order for the Hillgren lock mechanism to be patentable, it must be established as a combination which is an "invention".

What constitutes "invention" defies precise definition. The revisers of Title 35, U.S.C.A., apparently gave up even an attempt to establish an all-embracing statutory definition, for, among their definitions of terms used in the new Patent Code, appears the following: "The term 'invention' means invention or discovery." 35 U.S.C.A. §100(a). The courts have attempted at least to fix some guideposts to indicate wherein the realm of invention lies. These judicial attempts at definition are either very sweeping and consequently general, or so narrow as to be applicable only to a specific device or process. And at times the courts are content to establish what is definitely not inventive. To require "exceptional imaginative tal-

[2]Findings of Fact 6: "Claims 1 and 2 of said Letters Patent No. 2 403,597 each cover a new *combination* and each constitute *invention* over the prior art. [Emphasis ours.]

[3]Art. I, §8, Constitution, U.S.C.A.

ent"[4] or "creative genius"[5] or to declare that there must be an "impalpable something"[6] which "spring[s] from that intuitive faculty of the mind"[7] is of no concrete aid to a judge who is a layman in the fields of science and engineering.

In the circumstances where a patent is sought on a combination of devices or processes known to the prior art, the concept of invention remains elusive. It has been said that, in order for the combination to be considered a patentable invention it must "perform some new or different function—one that has unusual or surprising consequences." *Photochart v. Photo Patrol,* 9 Cir., 1951, 189 F. 2d 625, 627; *Grinnell Washing Machine Co. v. Johnson Co.,* 1918, 247 U.S. 426; *Great A. & P. Tea Co. v. Supermarket Equipment Corp.,* 1940, 340 U. S. 147. There is no invention in a "mere *aggregation* of a number of old parts or elements",[8] nor in the *accumlation* of old devices which do not in some way exceed "the sum of its parts".[9] [Emphasis ours.] Moreover, a truly inventive combination must create what had not before existed or bring to light what lay hidden from vision[10] in a way which can be distinguished from "simple mechanical skill".[11] A

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[4]*Gelardin v. Revlon Products Corp.*, 1948, 2 Cir., 164 F. 2d 910, 911.

[5]*Magnaflux Corp. v. Coe*, DCCA, 1943, 139 F. 2d 531; *Cuno Engineering Corp. v. Automatic Devices Corp.*, 1941, 314 U. S. 84, 91. But cf. 35 U.S.C.A. §103. 1952 Rev.

[6]*McClain v. Ortmayer*, 1891, 141 U. S. 419, 427.

[7]*Hollister v. Benedict Mfg. Co.*, 1885, 113 U. S. 59, 72.

[8]*Lincoln Engineering Co. v. Stewart-Warner Corp.*, 1938, 303 U. S. 545, 549; *Pickering v. McCullough*, 1881, 104, U. S. 310, 318.

[9]*Great A. & P. Tea Co. v. Supermarket Equipment Corp.*, 1950, 340 U. S. 147, 152; *Himes v. Chadwick*, 9 Cir., 1952, 199 F. 2d 100, 106.

[10]*Hollister v. Benedict Mfg. Co.*, 1885, 113 U. S. 59, 72.

[11]*McClain v. Ortmayer*, 1891, 141, U. S. 419, 427.

mere advance in efficiency and utility is not enough to convert a non-inventive aggregation into a patentable combination.

The Supreme Court has recently considered the problem of patentable combinations and has established certain criteria and standards which the federal courts must apply in determining whether a combination patent is valid. The Supreme Court directs us to "scrutinize combination patent claims with a care proportioned to the difficulty and improbability of finding invention in an assembly of old elements. The function of a patent is to add to the sum of useful knowledge. Patents cannot be sustained when, on the contrary, their effect is to subtract from former resources freely available to skilled artisans. A patent for a combination which only unites old elements with no change in their respective functions, * * * obviously withdraws what already is known into the field of its monopoly and diminishes the resources available to skillful men." *Great A. & P. Tea Co. v. Supermarket Equipment Corp.*, supra. The Supreme Court further requires that in order for a combination patent to be upheld, there must be a specific finding that the old elements which made up this device perform an additional and different function in combination, than they perform out of it. No such finding was made in the case at bar.[12] Nor do we believe that the district court

[12]The court based its conclusion of invention on the findings that the Hillgren lock used fewer parts and required fewer machining operations to accomplish "prior art functions and results", and on the finding that this was the first time the prior art reverse rocker type lock had been combined with the prior art deadlatching mechanism. Findings 9a to e.

applied the strict standard or close scrutiny to this combination patent required by the Supreme Court.

It is agreed that the deadlatch mechanism is to be found in the prior art. Hillgren's claim is based on the fact that he is the first person to apply the deadlatch mechanism to a reverse rocker type lock. Beyond the application of the deadlatch principle to the reverse rocker type lock, no novelty is shown by the exhibits or record, nor in the finding of the court.[13] Conceding a high degree of mechanical skill to effect the combination, we are firmly convinced that the district court was clearly wrong in concluding that such a combination is patentable for it accomplishes no more than the sum of its parts.

In both the prior art, as exemplified by the Schlage lock, and in the patented Hillgren lock, as well as the allegedly infringing Kwikset lock, the deadlatching mechanism is engaged behind the main bolt by the action of an auxiliary bolt and is disengaged by a lug attached to or operated in conjunction with the main action. The principle upon which the deadlatching mechanism operates is no different if used in conjunction with a direct action or reverse rocker type lock.

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[13]Hillgren's reduction of the number of parts necessary to accomplish the art of deadlatching, and his reduction in the number of machining operations to produce a reverse rocker type lock in no way establish patentable novelty in the combination of the deadlatching mechanism with a reverse rocker type lock since, as is shown by the Kwikset lock, such reductions are not necessary in order to effect the combination nor necessarily advantageous in any manner. Moreover, Kwikset admittedly uses more parts than Hillgren to deadlatch the bolt; and there is neither a claim nor a showing that Kwikset has copied or relied on Hillgren's fewer machining operations to manufacture the Kwikset reverse rocker type lock. Thus Kwikset does not infringe Hillgren's deadlatching or reverse rocker manufacturing processes.

Such difference as there is to be recognized must be restricted to the realm of admittedly skillful mechanical know-how.

The case of *Sargent v. Hall Safe and Lock Co.*, 1885, 114 U. S. 63, dealt with an attempt to patent a time guard on a combination-lock. The device there sought to be patented rendered the lock incapable of being unlocked until the arrival of a predetermined hour. It was admitted that a time guard had previously been employed in connection with a key lock. The Supreme Court, in holding the patent invalid, quoted with approval the board of patent examiners: "Nor, so far as we see, has any invention been exercised. The time-movement [deadlatching mechanism] was originally invented to prevent locks from being prematurely unlocked, and, when once the combination had been invented, it is obvious that it was as applicable to one form of locks as to another; and to grant a patent for the union of the time-movement [deadlatching mechanism] with every old form of lock, or with every new form which might appear, would manifestly place unjust restrictions on the original invention and defeat the very purpose of the law." *Sargent v. Hall Safe and Lock Co.*, supra, at p. 79; *Victor Cooler Door Co. v. Jamison Cold Storage Door Co.*, 1930, 4 Cir., 44 F. 2d 288, 295.

We conclude that the district court committed reversible error in sustaining Hillgren's "Door Lock" patent since in so doing it failed to apply the strict standard for testing combination patents which was

laid down by the Supreme Court in *Great A. & P. Tea Co. v. Supermarket Equipment Corp.*, supra.

Appellee, Hillgren, has relied heavily upon the presumption of validity which attaches to a patent granted by the patent office and sustained by the district court. And he further urges that a finding of validity is a finding of fact which cannot be reversed unless clearly erroneous. The patent in the *A. & P.* case, supra, had been sustained by the patent office and the district court, and the court of appeals had considered itself bound by the finding of fact of validity. Yet the Supreme Court reversed for failure to apply the proper test to a combination. We recognize and have given due weight to the expertness of the patent office and the thorough consideration of this problem by the district court. However, we must also recognize "that it is the 'standard of invention' that controls. That is present in every case where the validity of a patent is in issue. It is that question which the Court must decide. No 'finding of fact' can be a substitute for it in any case." Justice Douglas concurring in *Great A. & P. Tea Co. v. Supermarket Equipment Corp.*, supra, at p. 156; *Himes v. Chadwick*, 9 Cir., 1952, 199 F. 2d 100, 102.

II. THE KWIKSET "DOOR KNOB"

Kwikset's patent No. 2,489,160 is on a "method of making door knobs"; i.e., it is a process patent. And as such, its scope must be strictly limited to the particular manner in which its several parts are fitted

together as a door knob. A "patentee's broadest claim can be no broader than his actual invention." *Kemart Corp. v. Printing Arts Research Lab., Inc.*, 9 Cir., Jan. 26, 1953, ... F. 2d .....; *Schnitzer v. California Corrugated Culvert Co.*, 9 Cir., 1944, 140 F. 2d 275, 276.

The Kwikset knob has three major parts: the shell, an insert applicable to a door knob spindle, and a cap closing the outer end of the shell. Since knobs consisting of these three elements are not new to the art,[14] if the validity of the Kwikset patent is to be sustained, it must be by the particular construction of the several parts and the manner in which they are fitted together. Cf. *Cambridge Trust Co. v. Coe*, D.C.Cir., 1936, 87 F. 2d 543.

The district court in its findings describes the method by which the Kwikset cap it *fitted tightly* between the "annular portion" of the shell and the "annular portion" of the insert. The court's use of the term "annular portion" is apparently derived from the use of the term by Kwikset in its claims 3 to 6. In its claim 1, Kwikset uses the term "curl" and in its claim 2, the term "inwardly directed flange". We conclude that the three terms are synonymous.

An examination of the Kwikset knob shell discloses that the edge of the knob shell, which is the part grasped by the hand in using it, is curved or "curled" inwardly. The metal member, called "insert", attached to the lock-turning spindle, is curved at the end so as

[14]See, e.g., patents Nos. 242,922; 337,093; 1,687,531; 2,430,727, at pages 888, 889, 891, and 893 of the Record, respectively.

to fit the shell curve. A disk with a straight rim is pressed between the inwardly curved shell and the fitting member, completing the knob. It is seen that the rim of the cap is pressed between the curl of the shell and the member, and cannot be removed without disassembling the knob.

Under the provisions of the patent laws, a new and useful process is patentable. 35 U.S.C.A. §31; 35 U.S.C.A., 1952 Rev., §101. The district court has found that Kwikset's fitting or method of making a door knob is new and involves invention over the prior art, and we think the evidence supports the finding.

The district court found that the knobs manufactured and sold by Hillgren infringed Kwikset's door knob patent in that they were mere "colorable variations" and "mechanical equivalents" of Kwikset's invention. The court's finding of infringement is based upon findings 25 and 26, which we quote:

> "25.
>
> "The structure of a door knob comprising an insert applicable to a door lock spindle with a shell around the insert, the shell and insert presenting annular portions in close proximity to each other, and a cap closing the outer end of the shell having a flange disposed between the annular portions spread by the annular portion on the insert beneath the annular portion on the shell and *having a tight fit with the annular portions,* was new in the art." [Emphasis ours].

"26.

"The method of making the door knob and the structure resulting therefrom wherein an insert applicable to a door lock spindle and a surrounding shell are assembled together with both parts presenting annular portions near their outer ends and driving a flanged cap onto the insert so that its flange is spread by the insert beneath the annular portion on the cap and is held against springback by the continued engagement between flange and the insert, was new over the art and involved invention over what was known in the art."

While it is true that the district court's finding of infringement is a finding of fact and may not be set aside unless clearly erroneous, Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C.A.; *Graver Mfg. Co. v. Linde Co.*, 1950, 339 U.S. 605; *Faulkner v. Gibbs*, 9 Cir., 1948, 170 F. 2d 34, affirmed (Nov. 7) 1949, 338 U.S. 267, rehearing denied (Dec. 5) 1949, 338 U.S. 896, "it is [also] well settled that where, as here, there is no dispute as to the evidentiary facts, and the record and exhibits enable us to clearly comprehend the nature both of the process patented and the alleged infringing process, the question of infringement resolves itself into one of law, depending upon a comparison between the two processes and the correct application thereto of the rule of equivalency. The testimony in this case was largely expository and descriptive of the elements and operation of the two processes and was not disputed." *Kemart Corp. v. Printing Arts Research Lab., Inc.*, supra; *United States v. Esnault-Pelterie*, 1938, 303 U.S. 26, 30.

The Hillgren process or method of assembly is different from that of the Kwikset. In the Hillgren knob the edge of the shell does not curl, but extends directly against the cap flange. Thus the "curl" or "annular portion," which is a distinguishing characteristic of the Kwikset knob, is absent. Furthermore, the Hillgren cap flange is bent so that it forms a groove extending around the lower circumference of the cap. In assembling the Hillgren knob, the insert is placed within the shell; then the edge of the shell is forced laterally into the cap groove. The cap is thus held by a form of tongue-in-groove. Pressure against the cap flange between the shell and the insert is not an element of the Hillgren knob, as it is of the Kwikset knob. Thus the Hillgren cap is not held by a "tight-fit with the annual portions"[15] nor is the "springback"[16] of the "curl" essential to keeping the cap in place. And, finally, there is a pertinent difference in that the Kwikset cap is inserted by being forced between the shell and the insert, while the Hillgren cap is inserted by laterally forcing the shell toward the cap groove. The Kwikset and the Hillgren knobs are not equivalents since there is no substantial identity in the method of assembly nor in the method by which the cap is held in place. See *Kemart Corp. v. Printing Arts Research Lab., Inc., supra.*

Reversed, as to each judgment.

(Endorsed:) Opinion. Filed Mar. 16, 1953. Paul P. O'Brien, Clerk.

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[15]Finding 25.
[16]Finding 26.

UNITED STATES PATENT OFFICE

2,517,803

DOORKNOB

Nels H. Seaholm, Sierra Madre, Calif., assignor to Carl A. Hillgren, Huntington Park, Calif.

Application May 24, 1948, Serial No. 28,825

7 Claims. (Cl. 292—347)

1

This invention relates to a door knob.

One of the principal objects of this invention is to provide a door knob consisting of a thin outer shell member, a reinforcing core member anchored therein, and a cap secured to the outer end of the shell member over the outer end of the core member, in such a manner that the cap is tightly secured or crimped at its periphery to the shell comprising the main knob member.

Another important object of this invention is to provide a novel and rigid seam for securing a concealing or cap member to the inner and outer sides of an opening in a knob, or other member, an important object also consisting in the securing of said members together by reason of the construction of a core member which is also secured to the knob member and the cap.

An important object also of this invention is the provision of a novel and simple means of securing the core member of a knob of this class within the shell comprising or forming the outer element of the door knob.

A further important object of this invention is the provision of a novel, simple, and economical method of fabricating a door knob.

With these and other objects in view, as will appear hereinafter, I have devised a door knob having certain novel features of construction, combination, and arrangement of parts and portions, as will be hereinafter described in detail, and particularly set forth in the appended claims, reference being had to the accompanying drawings and to the characters of reference thereon, which form a part of this application, in which:

Fig. 1 is a longitudinal view of a door knob, partly in section and partly in elevation, embodying my invention in a preferred form;

Fig. 2 is an outer end view thereof, with portions broken away and in section to facilitate the illustration;

Fig. 3 is a sectional view of the inner end portion thereof, with this section taken through 3—3 of Fig. 1; and,

Fig. 4 is a partially exploded side view thereof, with the portions partly in section, and showing by dotted lines the knob member before securing the core member in place, and also showing the cap before being secured in place over the end of the knob member.

The door knob shown in the drawings consists essentially of only three members, namely, a main or outer door knob member 1, a core or core member 2, and a cap 3.

The knob member 1 is preferably pressed or spun from sheet metal with an oblate spheroidal

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portion 1^a forming the outer end portion of the knob, and with a substantially conically-shaped ferrule 1^b at the inner portion. In its substantially completely formed shape, the outer end portion of the knob member, that is, the outer side of the oblate spheroid-shaped outer end, has a relatively large central opening 1^c which is coaxial with the knob. The inner side of this oblate spheroidal portion has an annular shoulder 1^d which is substantially normal to the axis of the knob, and which is of a diameter substantially equal to the diameter of the opening 1^c, as shown in Figs. 1 and 4, and as will be more specifically referred to hereinafter.

The core member 2 has a substantially cylindrical portion 2^a at its outer end and a reduced conical portion 2^b inwardly thereof. The cylindrical or annular portion 2^a is enlarged and is designed to fit within the enlarged oblate spheroidal portion 1^a of the knob member while the portion 2^b fits against the inner wall of the ferrule portion 1^b of the knob member.

In the end of the cylindrical or annular portion 2^a of the core member is an annular groove 2^c which is of semi-circular cross-section. The inner edge 2^d of the groove is positioned radially inwardly of the edge of the opening 1^c, while the radially outer edge 2^e of the groove 2^c is positioned radially outwardly of such edge of the opening, that is, behind or at the inner side of the wall surrounding the opening 1^c.

The cap 3, before being secured to or forming a part of the knob, is cup shaped, that is, it has an inwardly extending annular flange 3^a which is positioned at a slight distance inwardly from the periphery of the cap, as shown in Fig. 4. When secured in position to the knob member 1 and the core 2, the flange is curled inwardly and assumes a shape shown in Fig. 1. In this position, the peripheral portion of the cap embraces both the inner and outer sides of the portion of the knob member surrounding the opening 1^c.

The knob member 1 is formed with a cup at its outer end before the core member 2 is inserted. The surrounding flange or side wall of the cup is cylindrical, as shown by A in Fig. 4. After the core 2 is inserted, the side wall or flange is folded inwardly with the inner edge substantially over the middle portion of the groove 2^c.

The cap 3 is positioned over the end of the knob with a flange 3^a inserted into the opening 1^c of the knob member 1 and into the groove 2^c. The cap is then forced into position by placing the inner side of the oblate spheroidal portion of the knob member, that is, the annular shoulder 1^d,

over an annular anvil, and then applying force against the outer side of the cap 3 at the portion indicated by the arrows B.

The core member 2 has, at its inner end, an axial portion 2^f having a keyed or polygonal opening 2^g, whereby the knob is secured to a lock spindle. This portion 2^f is shown as extending inwardly beyond the inner end of the ferrule, and is provided with longitudinal grooves 2^h at its opposite sides. The inner end of the ferrule has ears i^a which are bent inwardly into the grooves 2^h, thereby more rigidly securing the knob member 1 to the core member.

I wish it to be understood that I do not desire to be limited to the exact details of construction shown and described, for obvious modifications will occur to a person skilled in the art.

I claim:

1. In a door knob, a knob member having an oblate spheroid-shaped outer end portion with an axial opening in the outer end, an annular core anchored within said outer end portion of the knob member, the outer end of the core having an annular groove of substantially semi-circular cross-section, the radially inner edge of the groove being located radially inwardly from the edge of the opening and the radially outer edge of the groove being positioned behind the end portion of the knob member and an end cap having a peripheral flange extending into the opening and located within the groove, the peripheral outer portion of the cap and the inner portion of the flange embracing, respectively, the outer and inner sides of the edge portion of the knob member forming the opening.

2. In a door knob, a sheet metal knob member formed as a surface of revolution and having an oblate spheroid-shaped outer end portion with an axial opening in the outer end, an annular core anchored within said outer end portion of the knob member, a portion of the outer end of the core extending radially inwardly of the edge of the opening, the outer end of the core having an annular groove of substantially semi-circular cross-section, the radially inner edge of the groove being located radially inwardly from the edge of the opening and the radially outer edge of the groove being positioned behind the end portion of the knob member, and an end cap having a peripheral flange extending into the opening and located within the groove, the peripheral outer portion of the cap and the inner portion of the flange embracing, respectively, the outer and inner sides of the edge portion of the knob member forming the opening.

3. In a door knob, a knob member having an oblate spheroid-shaped outer end portion with an axial opening in the outer end, the inner portion of the knob member having a ferrule converging towards its inner end, an annular core member anchored within said outer end portion of the knob member, the outer end of the core member being enlarged and fitting partially within said spheroid-shaped end and having a reduced inner end fitting within said ferrule, the outer end of the core member having an annular groove of substantially semi-circular cross-section, the radially inner edge of the groove being located radially inwardly from the edge of the opening and the radially outer edge of the groove being positioned behind the end portion of the knob member, and an end cap having a peripheral flange extending into the opening and located within the groove, the peripheral outer portion of the cap and the inner portion of the flange embracing, respectively, the outer and inner sides of the edge portion of the knob member forming the opening.

4. In a door knob, a knob member having an oblate spheroid-shaped outer end portion with an axial opening in the outer end, an annular core anchored within said outer end portion of the knob member, the outer end of the core having an annular groove of substantially semi-circular cross-section, the radially inner edge of the groove being located radially inwardly from the edge of the opening and the radially outer edge of the groove being positioned behind the end portion of the knob member, the knob member having an annular shoulder at the inner side of the oblate spheroid-shaped portion and of a diameter substantially equal to the diameter of the opening, and an end cap having a peripheral flange extending into the opening and located within the groove, the peripheral outer portion of the cap and the inner portion of the flange embracing, respectively, the outer and inner sides of the edge portion of the knob member forming the opening.

5. In a door knob, a knob member having an oblate spheroid-shaped outer end portion with an axial opening in the outer end, the inner portion of the knob member having a ferrule converging towards its inner end, an annular core member anchored within said outer end portion of the knob member, the outer end of the core member being enlarged and fitting partially within said spheroid-shaped end and having a reduced inner end fitting within said ferrule, the outer end of the core member having an annular groove of substantially semi-circular cross-section, the radially inner edge of the groove being located radially inwardly from the edge of the opening and the radially outer edge of the groove being positioned behind the end portion of the knob member, and an end cap having a peripheral flange extending into the opening and located within the groove, the peripheral outer portion of the cap and the inner portion of the flange embracing, respectively, the outer and inner sides of the edge portion of the knob member forming the opening, the inner end of the core member extending inwardly of the ferrule and provided with longitudinal grooves at its diametrically opposite sides, the inner end of the ferrule having ears extending into said grooves.

6. In a door knob, a knob member having an enlarged outer end portion and a ferrule at its inner portion, the side walls of the ferrule converging towards the inner end of the knob member, the outer end of the knob member having an axial opening, a core member anchored within said knob member, and an end cap secured at its peripheral portion to the inner and outer sides of the edge portion of the opening, the inner end of the core member extending inwardly of the ferrule and provided with longitudinal grooves at its diametrically opposite sides, the inner end of the ferrule having ears extending into said grooves.

7. The herein described method of constructing door knobs consisting in making a knob member by forming an axial cup in the outer end thereof, forming an annular core member with an annular groove in the edge of its outer end, inserting the core member into the cup from the outer end, and folding the edge of the cup inwardly over the outer end of the core member and partially over the groove therein, forming

a cap with an annular flange at its inner side, inserting the inner end of the flange into the opening at the outer end of the knob member and into the inner radial portion of said groove, and then pressing said cap toward the knob member by applying a compression force between the outer side of the cap and the inner side of the enlarged outer portion of the knob member and thereby rolling the flange against the inner wall of the knob member at the portion surrounding the opening therein and thereby causing the cap to embrace the outer and inner sides of the knob member around said opening.

NELS H. SEAHOLM.

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The following references are of record in the file of this patent:

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Aug. 8, 1950 N. H. SEAHOLM 2,517,803

DOORKNOB

Filed May 24, 1948

Fig. 1.

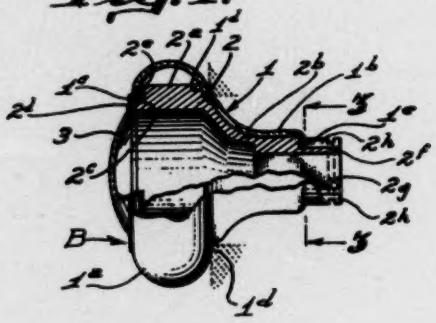


Fig. 2.

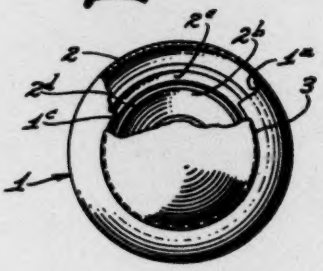


Fig. 4.

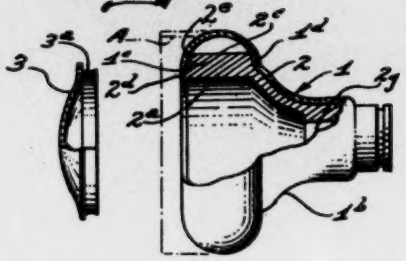
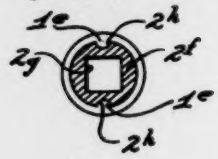


Fig. 3.



INVENTOR
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IN THE

Supreme Court of the United States

No. 768

October Term, 1953.

KWIKSET LOCKS, INC.,

Petitioner,

vs.

CARL A. HILLGREN,

Respondent.

BRIEF OPPOSING PETITION FOR CROSS-WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, Carl A. Hillgren, respectfully submits that the petition of Kwikset Locks, Inc., for a cross-writ of certiorari herein should be summarily dismissed because:

I. No jurisdiction and no justification therefor has been shown, since said petition shows:

1. No diversity of decision and no conflict between the decisions of two Courts of Appeal on the same matter.

   (U. S. Supreme Court Rule 38-5(b).)

2. No decision by the Court of Appeals of "an important question of local law in a way probably in conflict with applicable local decisions."

   (U. S. Supreme Court Rule 38-5(b).)

3. No decision by the Court of Appeals of "an important question of federal law which has not been, but should be, settled by this court."

(U. S. Supreme Court Rule 38-5(b).)

4. No decision by the Court of Appeals of "a federal question in a way probably in conflict with applicable decisions of this court."

(U. S. Supreme Court Rule 38-5(b).)

5. No evidence whatsoever that the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision."

(U. S. Supreme Court Rule 38-5(b).)

II. The decision of the Court of Appeals on the cross-appeal in this case is *correct* on its merits and is fully substantiated and justified by the record herein and by the law applicable thereto.

III. The petition for a *cross*-writ of certiorari herein is not only wholly unfounded in fact and in law, as set forth above, but, also in truth and in fact, it is merely an attempt by Kwikset Locks, Inc. to confuse and muddy the true issues involved in the petition for a writ of certiorari heretofore filed herein by Carl A. Hillgren, by a species of recriminatory contention that has absolutely nothing to do with the pending petition of Petitioner Carl A. Hillgren herein, which is well founded in fact and in law, as is fully shown in the petition of Carl A. Hillgren herein.

I. No Jurisdiction and No Justification Has Been Shown for the Petition of Kwikset Locks, Inc., for a Cross-Writ of Certiorari Herein Because:

1. No Diversity of Decision and No Conflict Between the Decisions of Two Courts of Appeal on the Same Matter Has Been Shown to Be Present in This Cross-appeal.

This first ground for issuing a writ of certiorari that is stated in Rule 38-5(b) of the Rules of the Supreme Court is clearly not present in the cross-appeal in this case, as the record shows no other case in which the cross-appeal Patent, No. 2,489,160, was in issue and certainly it shows no decision by any court of appeals on said Patent No. 2,489,160 other than the decision of the NINTH Court of Appeals in this case.

2. No Decision by the Court of Appeals of "an Important Question of Local Law in a Way Probably in Conflict With Applicable Local Decisions" Has Been Shown to Be Present in This Cross-appeal.

This second possible basis for a writ of certiorari stated in section 5(b) of Rule 38 of the Rules of the Supreme Court is also clearly not present in the cross-appeal in this case because NO LOCAL LAW is involved or even mentioned in the cross-appeal herein, or even in the entire record herein.

Section 5(b) of Supreme Court Rule 38 has been cited ONLY ONCE, according to "Shepard's United States Citations," in a case that did not involve a "conflict of lower court decisions" under the other divisions of Section 5(b), and that case furnishes no comfort whatsoever to Kwikset in the present case. The citation in question is

in *Chapman v. Federal Power Comm'n,* 345 U. S. 155, decided March 16, 1953, in which this Court said:

> "We granted Certiorari 343 U. S. 941. The cases present QUESTIONS OF IMPORTANCE in that they involve . . . the development of NATIONAL WATER RESOURCES.
>
> "Determination of the issues MAY AFFECT A SUBSTANTIAL NUMBER OF IMPORTANT POTENTIAL SITES for the development of hydro-electric power. *Cf.* Rules Sup. Ct. 38(5)(b)."

Certainly there is NO such "QUESTION OF IMPORTANCE" in the Cross-writ application herein, THOUGH THERE OBVIOUSLY ARE QUESTIONS OF MUCH GREATER IMPORTANCE AFFECTED BY THE ISSUES PRESENTED BY Petitioner HILLGREN IN HIS APPLICATION FOR A WRIT OF CERTIORARI NOW PENDING IN THE MAIN CASE HEREIN.

3. No Decision by the Court of Appeals of "an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court" Has Been Shown to Be Present in this Cross-appeal.

This third ground for the issuing of a writ of certiorari by the Supreme Court, that is stated in Section 5(b), Rule 38 of the Rules of the Supreme Court, is also CLEARLY NOT PRESENT in the cross-appeal in this case, as is perhaps most clearly and emphatically shown by the fact that Cross Petitioner Kwikset Locks, Inc. DOES NOT MENTION ANYWHERE IN ITS "PETITION FOR CROSS-WRIT OF CERTIORARI" HEREIN ANY "IMPORTANT QUESTION OF FEDERAL

LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT."

Since Petitioner Kwikset Locks, Inc. MENTIONS NONE IT MUST BE PRESUMED THAT NONE EXISTS!

The only questions mentioned by Petitioner Kwikset Locks, Inc. in its Petition for a Cross-writ of certiorari herein, (those reviewed at pages 4 and 5 of its petition), are NOT EVEN QUESTIONS OF LAW. THEY ARE ALL QUESTIONS OF FACT, NAMELY "HOW IS THE ACCUSED CONSTRUCTION MADE?", etc.

The "important questions of federal law, which have not been, but should be, settled by this court" that are fully shown by Petitioner Carl A. Hillgren in his "Petition for Writ of Certiorari with Brief in Support Thereof" and the "Appendix" thereto, which are not denied, refuted or rebutted in Respondents Kwikset Locks, Inc. *et al.'s* "Brief . . . in Opposition" thereto are strictly limited to the MAIN case and Petitioner Carl A. Hillgren's Petition herein and will NOT CONFER JURISDICTION ON THE CROSS-APPEAL NOR ON CROSS PETITIONER Kwikset Locks, Inc.'s "Petition for a Cross-writ of Certiorari" herein.

In other words, if this Court in its wisdom and discretion grants the petition of Carl A. Hillgren for a writ of certiorari in the main case herein, in order that it may promulgate its ruling on the three IMPORTANT exceptions to this Court's ruling in the *Great Atlantic and Pacific Tea Co.* case, 340 U. S. 147, that have been decided by various courts of appeal, but have not been but should be settled by this Court, such a writ of certiorari

in the main case herein WILL NOT CARRY WITH IT ON ITS COAT TAILS, SO TO SPEAK, THE PETITION FOR A CROSS-WRIT OF CERTIORARI FILED HEREIN BY KWIKSET.

Kwikset's wishful thinking of "what is sauce for the goose is sauce for the gander" will not confuse or deceive this Court as there is NO CONNECTION WHATSOEVER BETWEEN THE MAIN CASE AND THE COUNTERCLAIM HEREIN.

This third ground for certiorari, as stated in Rule 38-5(b) of the rules of this Court, is, therefore, clearly NOT PRESENT in the Cross-complaint part of this case.

4. No Decision by the Court of Appeals on "a Federal Question in a Way Probably in Conflict with Applicable Decisions of This Court" Has Been Shown to be Present in this Cross-appeal.

This fourth ground for issuing a writ of certiorari by the Supreme Court that is stated in Section 5(b) of Rule 38 of the Rules of the Supreme Court is CLEARLY NOT PRESENT in this case:

a. First: because no FEDERAL QUESTION of GREAT PUBLIC MOMENT has been decided by the Court of Appeals on the CROSS-appeal herein in probable conflict with any applicable decision of this Court. It MERELY DECIDED A SIMPLE, ORDINARY, LOCAL QUESTION OF NON-INFRINGEMENT.

b. Second: because no "decisions of this (Supreme) Court" have been cited or "shown" by Kwikset to be either "applicable" or "in conflict" with the decision of the Court of Appeals on the CROSS-appeal in this case.

In the first place, the Court of Appeals in the CROSS-appeal in this case decided a SIMPLE, ORDINARY, LOCAL QUESTION OF INFRINGEMENT—it decided that Hillgren's accused device DOES NOT INFRINGE BECAUSE IT OMITS ONE OR MORE ELEMENTS THAT ARE CONTAINED AS LIMITATIONS IN EACH OF THE CLAIMS IN ISSUE ON THE CROSS-COMPLAINT, WITHOUT SUBSTITUTING THEREFOR ANY "EQUIVALENT."

OMISSION OF AN ELEMENT FROM A CLAIM IS A SIMPLE, LOCAL QUESTION OF INFRINGEMENT.

There is no way, by any kind of devious word twisting, that Kwikset can make a FEDERAL QUESTION OF NATIONAL PUBLIC MOMENT OUT OF THAT SIMPLE, LOCAL QUESTION.

HILLGREN OMITTED ONE OF THE ELEMENTS OF EACH KWIKSET CLAIM WITHOUT SUBSTITUTING ANY "EQUIVALENT" FOR IT, AND THEREFORE HE DID NOT INFRINGE.

It is as simple as that—and no verbal fireworks or legal alchemy can change that simple, local question into a FEDERAL QUESTION OF GREAT PUBLIC MOMENT.

Secondly, even if a Federal question of great national public moment HAD been decided by the Court of Appeals on the cross-appeal herein, that fact alone COULD NOT FORM THE BASIS FOR GRANTING A CROSS-WRIT OF CERTIORARI HEREIN UNDER THIS FOURTH GROUND STATED IN SECTION 5 (b) OF RULE 38 OF THE RULES OF THIS COURT

UNLESS SUCH A DECISION IS SHOWN BY KWIKSET TO BE "PROBABLY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT." (Rule 38-5(b), U. S. Supreme Court Rules.)

Cross-Writ Petitioner Kwikset DOES NOT CITE ANY DECISIONS OF THIS COURT, NOR EVEN ASSERT THAT THERE ARE ANY DECISIONS OF THIS COURT THAT ARE "PROBABLY IN CONFLICT" WITH THE DECISION OF THE COURT OF APPEALS ON THE CROSS-APPEAL HEREIN THAT HILLGREN DOES NOT INFRINGE THE CROSS-COMPLAINT PATENT HEREIN BECAUSE HILLGREN OMITS ONE OR MORE ELEMENTS FROM EACH CLAIM IN ISSUE WITHOUT SUBSTITUTING ANY EQUIVALENT FOR SAID OMITTED ELEMENTS.

This fourth ground for certiorari is, therefore, clearly NOT PRESENT IN THIS CROSS-APPEAL.

5. No Evidence Whatsoever That the Court of Appeals "Has so Far Departed From the Accepted and Usual Course of Judicial Proceedings . . . as to Call for an Exercise of This Court's Power of Supervision" Has Been Shown to Be Present in this Cross-appeal.

Stripped of legal verbiage, the decision of the Court of Appeals on the cross-complaint meticulously followed "the accepted and usual course of judicial proceedings" by making the following successive findings or rulings:

a. "A district court's finding of infringement is generally considered to be a finding of fact that may not be set aside unless clearly erroneous." (Citing Rule 52(a), Federal Rules of Civil Procedure and cases following it.) [R. p. 910.]

This rule says ON ITS FACE that a fact finding of infringement CAN be set aside by the Court of Appeals IF IT IS CLEARLY ERRONEOUS.

This just happens to be one of those RARE cases where the District Court's finding of infringement WAS "CLEARLY ERRONEOUS," as is seen by the drawings on page 911 of the record WHICH CONCLUSIVELY SHOW THAT HILLGREN OMITS "CURL 19," which is an element of each Kwikset claim and therefore HILLGREN DOES NOT INFRINGE.

The Court of Appeals, therefore, would have been fully justified in reversing the District Court's holding of infringement under Rule 52(a) of the Federal Rules of Civil Procedure, *supra,* on the plain, simple and obvious, though "unusual," ground that the District Court's fact-finding of infringement WAS IN FACT "CLEARLY ERRONEOUS."

However, in an abundance of caution, and, undoubtedly in order to unquestionably follow "THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS" (Rule 38-5(b), Supreme Court Rules, *supra*), the Court of Appeals, with a fine show of judicial restraint, refrained from placing its decision on the cross-complaint on this "UNUSUAL" ground that the District Court's fact-finding of infringement was "CLEARLY ERRONEOUS," and, instead, placed its decision upon a more "USUAL" ground, namely,

b. "It is well settled that where, as here, there is no dispute as to the evidentiary facts, and the

record and exhibits enable us to clearly comprehend the nature both of the process patented and the alleged infringing process, the question of infringement resolves itself into one of LAW, depending upon a comparison of the two processes and the correct application thereto of the rule of EQUIVALENCY." [R. pp. 910-911.]

The Court thereupon showed CLEARLY and CONCLUSIVELY that Hillgren is NOT the EQUIVALENT of Kwikset. [R. pp. 911-913, incl.]

Here, again, the Court of Appeals did not "depart" in the least from the "accepted and usual course of judicial proceedings." (Supreme Court Rule 38-5(b), *supra.*)

By time-honored text-book definition there are two tests of EQUIVALENCY:

"(a) Identity of function;

(b) Substantial identity of way of performing that function." (Deller's Walker on Patents, Sec. 466, at p. 1703.)

The Court of Appeals showed fully and convincingly that the Hillgren process and structure DO NOT MEET THESE TESTS OF EQUIVALENCY [R. pp. 911-913] as follows:

i. "In the Hillgren knob the edge of the shell DOES NOT CURL, but rather directly faces the insert. See diagram in margin, 18. Thus, the 'curl' or 'annular portion' [*note 19, R. p. 911, shows that "it would be inaccurate to extend that definition*

to the contact edge of the Hillgren shell"] which is a distinguishing characteristic of the Kwikset knob, IS ABSENT from the Hillgren knob." [R. pp. 911-912.]

ii. "The Kwikset knob has a concave area on the insert which serves the . . . purpose . . . of establishing a contact area between the shell and the insert in their grasp of the cap flange." [R. p. 912.]

The Court of Appeals indicates clearly that this function is NOT PRESENT in Hillgren. [R. p. 912.]

This is also PROVEN CONCLUSIVELY by Kwikset's own "EXHIBIT D," which Kwikset stated "shows the insert and ferrule in assembled relationship prior to the application of the cap." [R. p. 60.] This Exhibit D shows that THERE IS SO MUCH SPACE between the insert and the ferrule that IT WOULD BE PHYSICALLY IMPOSSIBLE FOR THE HILLGREN SHELL EDGE [18 in Hillgren drawing, R. p. 911] TO PERFORM THE ABOVE REQUIRED KWIKSET FUNCTION "OF ESTABLISHING A CONTACT AREA BETWEEN THE SHELL AND THE INSERT IN THEIR GRASP OF THE CAP FLANGE." [R. p. 912, *supra.*]

iii. "In the Kwikset knob, it is important that *initially* there be a tight fit between the shell curl and the insert in order that sufficient spring-back be created in the shell curl to hold the cap in place." [R. pp. 912-913.]

The Court of Appeals clearly showed that this Kwikset function, and way of performing it (and hence

"equivalency"), is CLEARLY ABSENT FROM HILLGREN, as follows:

> "By way of comparison, in the assembly of the Hillgren knob THERE IS A SPACE between the insert and the shell edge" (18). [R. p. 913.]

This "SPACE" between the Hillgren insert and shell edge is much GREATER than the thickness of the flange on the Hillgren cap, as is seen by merely comparing the flange on the Hillgren cap with the "SPACE" between the Hillgren insert and shell edge in Exhibit D.

This means that if the flange on the Hillgren cap is inserted between the Hillgren insert and shell in Exhibit D there will be no Kwikset function of gripping the flange of the cap between the insert and the shell, as is shown by the excerpts from the record in the next sub-section, immediately hereinbelow.

> iv. "An *inward lateral pressure* is placed upon the HILLGREN shell to keep its edge in position while the cap flange is being shaped to embrace it." [R. p. 913.]

This is a Hillgren FUNCTION and WAY OF PERFORMING IT that is NOT PRESENT IN Kwikset.

The record clearly shows the facts:

> "Q. We have an exhibit here . . . Exhibit D . . . At THAT STAGE is there any PRESSURE between the circular opening of THE SHELL and THE INSERT? A. No." [R. pp. 778-779.]

> "Q. At that point does the flange of the cap slide EASILY between the INSERT and the outside SHELL as shown in Exhibit D? A. YES. IT FITS FREELY INTO THAT.

"Q. So that there is MORE space between the insert and the shell than the THICKNESS OF THE FLANGE on the cap? A. That's right." [R. p. 779.]

The die that is used in the Hillgren process to furnish the "INWARD LATERAL PRESSURE" referred to in the above heading [R. p. 913] is CLEARLY DESCRIBED in the record, as follows:

"Q. Is there a die that is used to COMPRESS THE SHELL? A. Yes.

"Q. Describe that die. A. Well, it is just a die about the same shape as this knob and the cap is put in there and it is brought down, IT PUSHES the cap down and THE SHELL IN at the same time.

Q. BEFORE that die is used, is there any pressure between the shell and the cap, or is it a loose fit? A. It is a LOOSE FIT.

Q. And the TIGHT FIT between the shell and the cap is ACQUIRED BY THAT DIE, is that right? A. Yes, that's right." [R. p. 780.]

The above is the UNCONTROVERTED testimony of the respondent Hillgren's witness.

Cross-complainant Kwikset DID NOT OFFER A SINGLE WORD OF TESTIMONY BY A SINGLE ONE OF ITS WITNESSES TO PROVE ANY OTHER MODE OF OPERATION OR WAY OF PERFORMING THE HILLGREN FUNCTION OF JOINING THE HILLGREN CAP AND SHELL.

The above shows CONCLUSIVE NON-INFRINGEMENT BY HILLGREN, because it SHOWS THAT HILLGREN DOES NOT HAVE THE SAME FUNC-

TIONS, NOR SUBSTANTIALLY THE SAME WAY OF PERFORMING THOSE FUNCTIONS AS KWIKSET, AND, THEREFORE, UNDER THE ABOVE WELL-KNOWN FUNDAMENTAL TESTS OF "EQUIVALENCY":

HILLGREN IS NOT THE "EQUIVALENT" OF KWIKSET.

For the above reasons the Court of Appeals made its final ruling on the cross-appeal as follows:

> v. "Since the Hillgren knob construction is based solely upon the tongue-in groove principle in such a way as to eliminate the need for spring-back pressure employed in the Kwikset knob to hold the cap in place. WE CONCLUDE THAT THE HILLGREN KNOB DOES NOT INFRINGE THE KWIKSET PATENT." [R. p. 913.]

Hillgren respectfully submits that the above decision of the Court of Appeals on the cross-complaint herein does NOT in any way "DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS" and does NOT in any way "call for an exercise of this Court's power of supervision." (U. S. Supreme Court Rule 38-5(b).)

This fifth ground for certiorari that is stated in Rule 38-5(b) of the rules of this Court is, therefore, CLEARLY NOT PRESENT in the cross-complaint case herein.

Section Summary.

Thus, clearly, the petition of Kwikset Locks, Inc., for a CROSS-writ of certiorari herein should be SUMMARILY DENIED AND DISMISSED because not only has no jurisdiction and no justification been shown for it by Kwikset, but Hillgren has fully and affirmatively shown hereinabove that EACH ONE OF THE FIVE (5) GROUNDS FOR GRANTING WRITS OF CERTIORARI THAT ARE STATED IN SECTION 5(b) OF RULE 38 OF THE RULES OF THE SUPREME COURT IS CLEARLY ABSENT IN THE CROSS-COMPLAINT CASE HEREIN.

II. The Decision of the Court of Appeals on the Cross-Appeal in This Case Is in Fact Correct on Its Merits and Is Fully Substantiated and Justified by the Record Herein and by the Law Applicable Thereto.

The Court of Appeals' decision on the Cross-Complaint was to REVERSE THE DISTRICT COURT'S DECISION ON THE QUESTION OF INFRINGEMENT.

The only possible ultimate reason for granting the CROSS-WRIT herein, therefore, would be to permit the Supreme Court to reverse the Court of Appeals ON THE QUESTION OF INFRINGEMENT.

But REVIEW OF DECISIONS ON QUESTIONS OF INFRINGEMENT ARE NOT THE BASIS OF THE GRANTING OF WRITS OF CERTIORARI WITH ONE SINGLE EXCEPTION, WHICH IS NOT PRESENT IN THIS CASE, NAMELY, A DIVERSITY OF DECISION OR A CONFLICT BETWEEN THE DECISIONS OF TWO COURTS OF APPEAL ON THE SAME MATTER, *i. e.,* ON THE SAME ISSUE OF INFRINGEMENT.

In this case the District Court said that Hillgren DID NOT OMIT AN ELEMENT from the claims, and the Court of Appeals RULED THAT THE DISTRICT COURT WAS CLEARLY WRONG and that Hillgren DID OMIT AN ELEMENT FROM EACH OF THE CLAIMS, AND DID NOT SUBSTITUTE AN "EQUIVALENT" THEREFOR.

This is a clear conflict of decisions on a question of infringement BUT IT IS NOT BETWEEN TWO

COURTS OF APPEAL SO NO GROUND FOR CERTIORARI IS PROVIDED THEREBY.

FURTHERMORE THE COURT OF APPEALS WAS RIGHT ON THIS QUESTION of infringement, as is most clearly seen by MERELY COMPARING THE COURT OF APPEALS' DECISION ON THE CROSS-COMPLAINT [R. pp. 911-913] with the ACTUAL EXHIBITS REFERRED TO THEREIN SHOWING THE STAGES OF CONSTRUCTION OF THE ACCUSED HILLGREN DEVICE, PARTICULARLY EXHIBIT D.

As the Court of Appeals correctly said "there is no dispute as to the evidentiary facts, and the record and exhibits enable us to clearly comprehend the nature both of the process patented and the alleged infringing process." [R. p. 910.]

The two drawings on page 911 of the record, Kwikset on the left and Hillgren on the right, TELL THE WHOLE STORY!

The shell (18 in both drawings) has a curl 19 at the outer end of Kwikset BUT THIS CURL 19 IS NOT PRESENT IN HILLGREN!

Instead, as the Court of Appeals correctly describes it, "in the Hillgren knob the edge of the shell DOES NOT CURL, but rather DIRECTLY faces the insert. See diagram in margin 18." [R. p. 911.]

THIS IS THE HEART OF THIS CROSS-APPEAL CASE!

All of Kwikset's claims are limited to this *curl 19* which is NOT PRESENT in Hillgren. The Kwikset claims refer to curl 19 as either a curl or an "annular"

portion which the Court of Appeals, in note 19 on page 911 of the record, says "means ring shaped," according to Webster's Dictionary. The Court of Appeals correctly ruled that "IT WOULD BE INACCURATE TO EXTEND THAT DEFINITION TO THE CONTACT EDGE OF THE HILLGREN SHELL." [R. p. 911.]

Also the Court of Appeals CORRECTLY RULED that "THERE IS A SUBSTANTIAL DIFFERENCE IN THE PRINCIPLES OF CONSTRUCTION OF THE TWO KNOBS WHICH IS REFLECTED IN THE METHODS BY WHICH THEY ARE ASSEMBLED, to wit:

> "IN THE KWIKSET KNOB, IT IS IMPORTANT THAT INITIALLY THERE BE A TIGHT FIT BETWEEN THE SHELL CURL AND THE INSERT IN ORDER THAT SUFFICIENT SPRING-BACK BE CREATED IN THE SHELL CURL TO HOLD THE CAP IN PLACE." [R. pp. 912-913.]

This "CURL 19" and its "SPRING-BACK," created by the TIGHT FIT between the SHELL CURL and the INSERT, is found by the Court of Appeals to be CLEARLY NOT PRESENT IN HILLGREN.

THIS IS THE REAL DECISION OF THE COURT OF APPEALS ON THE CROSS-COMPLAINT.

A SIMPLE DECISION ON NON-INFRINGEMENT BASED ON

(1) OMISSION OF AN ELEMENT (CURL 19),

and

(2) NO EQUIVALENCY BETWEEN THE OMITTED ELEMENT ("CURL 19"), AND THE "CONTACT EDGE OF THE HILLGREN SHELL" WHICH, AS THE COURT OF APPEALS SAID "DOES NOT CURL, BUT RATHER DIRECTLY FACES THE INSERT," [R. p. 911], IS ALL THAT THE COURT OF APPEALS DECIDED ON THE CROSS-APPEAL!

No question of great public importance, no issue of great moment, and no conflict with any decision of any Court of Appeals, or of the Supreme Court, is in any way involved in this simple decision of NON-INFRINGEMENT because an element of the claims is omitted without an equivalent thereof being substituted!

The Petition for a cross-writ is thus so obviously UNFOUNDED that it naturally leads one to wonder "WHY WAS IT FILED?" Why did Kwikset WASTE THE MONEY that it obviously cost to prepare and print the petition for a cross-writ? WHAT WAS THE MOTIVE?

THERE IS ONLY ONE ANSWER.

Kwikset never intended to sue Hillgren. It falsely represented to the Patent Office that Hillgren infringed, in order to speed up the issuance of its patent. [See Kwikset file wrapper, Ex. 6, R. p. 52]. Then when the patent issued, on November 22, 1949, Kwikset DID NOT SUE HILLGREN AND NEVER WOULD HAVE DONE ANYTHING IF HILLGREN HAD NOT FILED THE COMPLAINT HEREIN ON FEBRU-

ARY 6, 1950. [R. pp. 3-4.] EVEN THEN KWIKSET MERELY FILED A COUNTERCLAIM ON MARCH 22, 1950 [R. pp. 5-10], IN HILLGREN'S VALID AND LEGITIMATE SUIT AGAINST KWIKSET EXACTLY FOUR (4) MONTHS AFTER KWIKSET'S PATENT ISSUED, AND A MONTH AND A HALF AFTER THE COMPLAINT WAS FILED HEREIN, FOR THE SOLE PURPOSE OF MISLEADING OR DIVERTING THE COURT AWAY FROM HILLGREN'S VALID MAIN CASE.

KWIKSET DID NOT FOOL THE DISTRICT COURT!

BUT IT DID MISLEAD THE COURT OF APPEALS INTO FALLING INTO ERROR IN THE MAIN CASE.

NOW IT IS TRYING TO MISLEAD THIS COURT BY ITS SILLY AND UTTERLY UNFOUNDED "CROSS-WRIT" APPLICATION WHICH WAS FILED BY KWIKSET IN A LAST DESPERATE ATTEMPT TO TRY TO GET THIS COURT TO DENY HILLGREN'S WELL-FOUNDED AND WELL-DOCUMENTED PETITION FOR CERTIORARI IN THE MAIN CASE HEREIN.

HILLGREN DOES NOT BELIEVE THAT THIS COURT WILL BE MISLED, AS WAS THE COURT OF APPEALS, BY THIS UNFOUNDED RECRIMINATORY "CROSS-WRIT" CONTENTION—A SORT OF "IN PARI DELICTU" PLEA WHICH DOES NOT IN FACT EXIST, AS HILLGREN WILL NOW SHOW.

III. The Petition for a Cross-writ of Certiorari Herein Is Not Only Unfounded in Fact and Law, as Is Fully Above Shown, but It Is in Truth and in Fact Merely an Attempt to Confuse the True Issues in the Petition for Certiorari Already on File in the Main Case Herein by a Species of Fictitious Recriminatory Contention That Has Absolutely Nothing to Do With the Petition for Certiorari in the Main Case Herein Which is Well Founded in Truth and in Law—and Which Is Not Seriously Contested or Even Threatened—Except by This Fictitious Petition for a Cross-writ.

The foregoing sections of this brief show that the petition for a CROSS-writ of certiorari herein is so utterly and obviously unfounded that it must have been filed for some other purpose than to secure its granting.

That other purpose, or ULTERIOR MOTIVE, to use a more popular name for it, becomes glaringly apparent when one reviews the "Brief for Respondents Kwikset Locks, Inc., *et al.*, in Opposition to Petition for Writ of Certiorari" filed herein by Kwikset.

In short, Kwikset's "Brief" in purported opposition to Hillgren's Petition DOES NOT CONTAIN A SINGLE REPLY TO, NOR EVEN A MENTION OF, ANY OF THE POINTS MADE IN HILLGREN'S PETITION!

Hillgren can only surmise that this is because the points made in his petition are UNANSWERABLE.

Confronted wtih that situation Kwikset resorted to the familiar defendant's device: when you have no defense, TRY THE PLAINTIFF!

Hence, Kwikset filed its fictitious petition for a CROSS-writ.

Conclusion.

The Supreme Court should, therefore, grant the petition for a writ of certiorari prayed for by Petitioner Carl A. Hillgren, herein, for the reasons stated in his "Petition" and its "Appendix," and not even answered in respondent Kwikset's "Brief," and should also summarily dismiss and deny the utterly unfounded and fictitious petition of Kwikset Locks, Inc. for a *cross*-writ of certiorari herein.

Respectfully submitted,

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